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ABSTRACT

This article explains briefly how the Age Discrimination in Employment Act (ADEA) of 1967 applies to certain hiring practices. The four sections of the paper cover the following: (1) the scope of the ADEA, including coverage, prohibited conduct, and legal remedies for workers who feel they have suffered discrimination; (2) hiring older workers, including advertisements of job vacancies, employment applications, and interviewing; (3) the hiring decision, including full- or part-time work, salary, benefits, benefits coverage, pension benefits, and health insurance; and (4) promotion and training. (KC)

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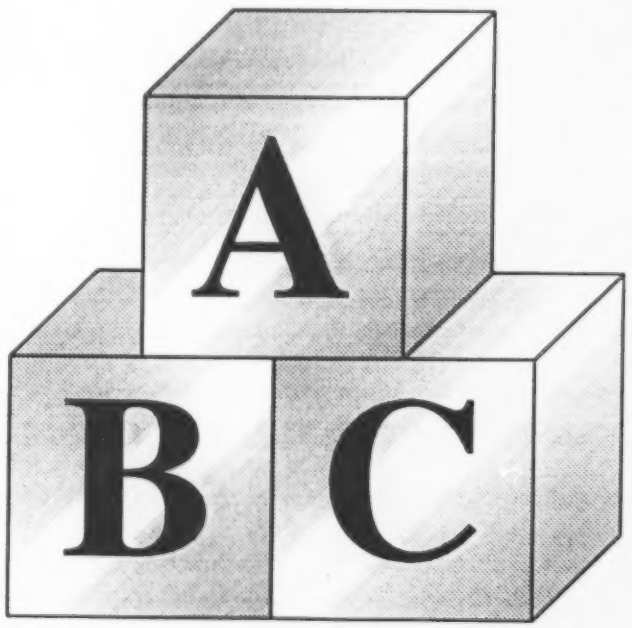
# The Legal ABCs of Hiring Older Workers

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The Age Discrimination in Employment Act of 1967 ("ADEA") is designed to protect older workers from discrimination on the job. One of the primary purposes of the law is to eliminate discrimination in hiring.

This article briefly explains how the ADEA applies to certain hiring practices. It examines the law's requirements and employers' obligations. It is not intended to be comprehensive or to provide legal advice for any particular situation. Employers should consult their own counsel for specific legal advice.

# I. THE SCOPE OF THE ADEA

## COVERAGE

***Employers Covered*** - The ADEA covers most private employers. The ADEA defines an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b). Part-time employees are included for the purposes of meeting the 20-employee limit. The ADEA also covers employment agencies, state and local governments, and labor organizations with at least 25 members.

***Employees Covered*** - Employees and applicants for employment age 40 and older are protected by the ADEA, regardless of the number of hours worked daily, weekly, or annually. Federal, state and local government employees are also covered.

***State Law Coverage*** - In addition to the ADEA, most states have enacted laws which also prohibit employment discrimination on the basis of age. Many state laws cover employers with 10 or fewer employees, and provide protections beyond those afforded by the ADEA. For example, some state laws apply to private employers with as few as one employee. In some instances, state law may provide legal remedies (i.e. pain and suffering damages) that are unavailable under the ADEA. You should consult a knowledgeable attorney in your state to familiarize yourself with applicable state law.

## PROHIBITED CONDUCT

The ADEA prohibits discrimination on the basis of age in virtually all terms and conditions of employment. An employer may not refuse to hire an applicant because of his or her age. It is also unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . ." Likewise, an employer cannot "limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status. . ." 29 U.S.C. § 623(a)(2).

Labor organizations and employment agencies may not maintain referral systems that discriminate against individuals based on age.

### *LEGAL REMEDIES*

If a court finds that an applicant has been unlawfully denied a job, the court would order the employer to hire the individual with back pay from the date she was first denied the job. A court may order front pay if instatement to the position is not appropriate. In cases where the employer willfully violates the law, employees may be awarded liquidated (double) damages. In all successful cases, the prevailing plaintiff is entitled to reimbursement of attorneys' fees and costs incurred during the litigation.

## *II. HIRING OLDER WORKERS*

### *ADVERTISEMENTS FOR EMPLOYMENT*

The ADEA specifically prohibits advertisements or notices for employment that discriminate based on age. 29 U.S.C. § 623(d). The prohibition broadly applies to any preference, limitation, or specification based on age. For example, it is unlawful to advertise for "young college graduates" or "attorneys age 25-30 for six-figure salary." Other ads seeking "recent college graduate" or "youth-oriented" applicants may send the same message as the more blatantly age-based ads.

Advertising for a position, like any other employment practice, must be determined by the legitimate qualifications for the position. Since age is rarely a legitimate qualification, references to age or age-related criteria should be avoided in employment advertisements when the effect is to deter older workers from applying for the job.

While the ADEA does not flatly prohibit such expressions as "Prefer Retirees" or "Prefer Older Applicants," some state laws may prohibit discrimination in favor of older individuals. For that reason, employers are well advised to steer clear of such direct expressions of age in written solicitations for applicants even when the purpose is to attract older workers. Employers interested in encouraging older applicants should consider the use of expressions such as "experience a plus" or "mature judgment" preferred.

### *THE EMPLOYMENT APPLICATION*

Far too often, standardized employment applications actually deter older applicants by directly asking their age or by seeking information which would their age to a discerning reviewer. While it is not *per se* unlawful under the ADEA to ask an applicant to specify age (or date of birth), federal regulations provide that employment application forms which request such information will be closely scrutinized to assure

that the request is for a permissible purpose and not for purposes proscribed by the ADEA. 29 C.F.R. § 1625.5 (1996). Since questions which directly seek the age of the applicant may deter older workers, the far better practice is to avoid their use on an application form.

Similarly, application forms should be carefully reviewed to ensure that they do not seek other information which would indirectly require the applicant to reveal his/her age. While questions regarding military service and high school and college degrees may be job related, these inquiries all too frequently require the applicant to specify the date on which the degree was conferred. In many cases, this "proxy" for age is of little or no value to the hiring manager. Inquiries like this should be eliminated unless there is a compelling (and job related) reason for a recent degree.

### *INTERVIEWING*

Employers need to insure that they treat older job seekers in the same manner as other job seekers. That means the same questions should be asked. Employers should not assume that an older applicant with particular experience or job skills would become dissatisfied and leave the job.

Unfortunately, employers often tell older job seekers they are overqualified for the job. Perhaps some employers may view it as a compliment to the older worker. But for the older person who needs and wants the job, it is often a frustrating experience.

Some courts have held that the terms "overqualified" and "overspecialized" are code words for "too old." Denying an older applicant a job because he is overqualified can be age discrimination, pure and simple. To prevent such discrimination, employers should erase preconceived notions about what entry-level candidates should "look like" -- particularly in light of the changing and aging work force.

## *III. THE HIRING DECISION*

Full or Part-time - Naturally, the demands of your business should pay a prominent role in directing your search toward either full-time or part-time employees. Studies have shown, however, that some individuals without regard to age, prefer the greater flexibility afforded by part-time employment. Both options have advantages and disadvantages for employers and employees.

One of many methods to avoid problems in this area is to ask all applicants regardless of their age, whether they wish to be considered for full or part-time work. Employers should consider devising a system of internal review that provides priority consideration to all internal applicants who want to be considered for alternative work

schedules (either from part-time to full-time or vice-versa). When filling part-time positions, employers should not overlook their ongoing obligations to provide non-discriminatory consideration to all applicants for all vacancies.

As a general rule, it is not unlawful under the ADEA to fill a part-time position with an older individual. However, problems may arise under the ADEA if older workers are routinely channeled into part-time positions and not considered for full-time work. The potential danger here would be magnified if part-time employment lacked some (or all) of the employee benefits that accompanied full-time work. An employer who gets caught in this trap runs the risk of appearing to want to hire only cheap (older) labor.

**Salary** - The benchmark for discrimination is the manner in which employees similarly situated are treated. Older employees should be treated in the same fashion as current workers. Policies and practices concerning pay and benefits would be uniformly applied without regard to age.

Prospective employers should not consider (a) entitlement to social security benefits or (2) receipt of pension income (public or private) in determining an appropriate wage for an older employee. Since these factors would affect only the wages of older workers, they would most likely violate the ADEA.

**Benefits** - While most employers pay non-discriminatory wages (salary or hourly pay), some mistakenly assume that older hires need not be provided the range of employee benefits provided to other employees. A difference in benefits based on the age of the employee may violate the ADEA. A misstep here could prove costly.

**Benefit Coverage** - Although the availability of benefits to part-time workers may attract older applicants, employers are under no legal obligation to provide full-time and part-time employees with the same benefits package. The benchmark, again, is with similarly situated employees. If younger part-time employees are provided pension coverage, vacation pay, and life insurance, their older counterparts should receive similar benefits.

**Pension Benefits** - Both the ADEA and the federal pension law, the Employee Retirement Income Security Act ("ERISA"), prohibit employers from excluding older employees from participation in a pension plan based on their age at hire. Employers are not required to provide pension benefits to employees who work less than 1,000 hours per year.

**Health Insurance** - Special rules apply to workers eligible for Medicare coverage, i.e. age 65 and older. Employees aged 65 or older and any employee's spouse age 65 or older shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee . . . under age 65. Regulations of the Health Care Finance Administration require employers to provide employees age

65 and older with the same coverage at the same cost to the employee, as is provided to their younger counterparts. Naturally, if younger part-time employees receive no coverage, similar treatment of older part-time workers is permissible.

## *IV. PROMOTIONS AND TRAINING*

Once employed, older workers may not be denied training and promotional opportunities based on their age. The most frequently heard justification for passing over older employees is that "they would be retiring anyway." Aside from the perils involved in using a classic age stereotype such as this, anecdotal experience indicates that it may not be true. Indeed, in many industries, workers hired at older ages are more likely to remain on the job for longer periods of time than their younger counterparts. The best approach here is to use objective measures, i.e. performance, as the basis for training and promotional opportunities.

## *V. CONCLUSION*

The foregoing is intended to provide only a thumbnail sketch of the requirements of the ADEA. State laws may impose additional requirements, as can ERISA, the federal pension statute. In all cases, you are well advised to consult an experienced labor or employment discrimination attorney if you have any questions.

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